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Attorneys for Plaintiff Theadora King

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THEADORA KING, individually and on behalf)
of all others similarly situated,)

Plaintiff,)

v.)

SAFEWAY, INC.,)

Defendant.)

No. 08-cv-0999-MMC

REQUEST FOR LEAVE TO FILE
RESPONSE TO SAFEWAY'S
REQUEST FOR JUDICIAL NOTICE
VIS-À-VIS PLAINTIFF'S PENDING
REMAND MOTION

ACTION FILED: January 11, 2008

1 Plaintiff Theadora King, individually and on behalf of all others similarly situated, and in
 2 support of Plaintiff's Request for Leave to File Response to Safeway's Request for Judicial Notice
 3 Vis-à-Vis Plaintiff's Pending Remand Motion, pursuant to Civil L.R. 7-3(d), hereby requests leave of
 4 the Court to file a response to Safeway's Request for Judicial Notice.

5 Following a fully briefed motion to remand which is presently set for hearing on Friday,
 6 April 25, 2008, Defendant Safeway, Inc. filed its Request for Judicial Notice Vis-à-Vis Plaintiff's
 7 Pending Remand Motion on April 18, 2008 ("Request for Judicial Notice"). Defendant's request
 8 violates Civil L.R. 7-3(d), as not only does this improper motion fail to request judicial notice of a
 9 relevant judicial opinion, but also the request contains legal argument rather than restricting itself to
 10 citing new, relevant legal authority.

11 Because Plaintiff believes that Safeway uses its Request for Judicial Notice as an opportunity
 12 to file a surreply, Plaintiff requests leave from this Court to file the attached Response to Safeway's
 13 Request for Judicial Notice Vis-à-Vis Plaintiff's Pending Remand Motion ("Response"). In doing
 14 so, Plaintiff does not offer the Response to question the accuracy of the documents of which Safeway
 15 requests judicial notice. Instead, Plaintiff's Response is necessary to dispute Safeway's
 16 characterization of these documents to the Court and their relevance to the issues before this Court
 17 on Plaintiff's Motion to Remand.

18 Accordingly, for the reasons provided above and in the attached Response, Plaintiff
 19 respectfully requests leave to file Plaintiff's Response to Safeway's Request for Judicial Notice Vis-
 20 à-Vis Plaintiff's Pending Remand Motion, attached hereto as Exhibit 1, together with the declaration
 21 of Shana E. Scarlett in support thereof, attached hereto as Exhibit 2, and for all such other relief as
 22 this Court deems necessary and appropriate.

23 Dated: April 21, 2008

Respectfully submitted,

24 HAGENS BERMAN SOBOL SHAPIRO LLP

25 By /s/ Shana E. Scarlett
 26 SHANA E. SCARLETT

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Attorneys for Plaintiff Theadora King

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2008 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses registered, as denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

/s/ Shana E. Scarlett
SHANA E. SCARLETT

Mailing Information for a Case 3:08-cv-00999-MMC

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Steve W. Berman**
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- **Mark S. Mester**
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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

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Exhibit 1

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THEADORA KING, individually and on behalf)
of all others similarly situated,)

Plaintiff,)

v.)

SAFEWAY, INC.,)

Defendant.)

No. 08-cv-0999-MMC

PLAINTIFF'S RESPONSE TO
SAFEWAY'S REQUEST FOR
JUDICIAL NOTICE VIS-À-VIS
PLAINTIFF'S PENDING REMAND
MOTION

ACTION FILED: January 11, 2008

I. INTRODUCTION

Using its Request for Judicial Notice Vis-à-Vis Plaintiff's Pending Remand Motion, filed April 18, 2008 ("Def's RJN"), as an opportunity to file a surreply, Safeway requests judicial notice of two items: (1) the March 28, 2008 Hearing Transcript before the Multidistrict Litigation ("MDL") Transferee Court in *In Re Aurora Dairy Corp. Organic Milk Marketing and Sales Practice Litigation*, Eastern District of Missouri Case No. 4:08-md-01907-ERW ("March 28, 2008 Hr'g Tr.") [Dkt. No. 39-2]; and (2) Plaintiff's Memorandum of Law in Support of Motion to Vacate Conditional Transfer Order (CTO-2), filed April 11, 2008 ("Plaintiff's Vacate Memorandum") [Dkt. No. 39-3], as it applies to this case. While Plaintiff does not dispute the accuracy of the underlying transcript or brief, Plaintiff does dispute Safeway's purported quotations from and characterization of these documents to the Court, as well as their relevance to the issues before this Court on Plaintiff's Motion to Remand.

II. ANALYSIS

A. The March 28, 2008 Hearing Transcript

First, Safeway requests judicial notice of the transcript of proceedings before Judge E. Richard Webber, the transferee judge in the MDL proceeding, observing that "the group of lawyers in the Consolidated Action that includes Plaintiff's counsel represented to Judge Webber that choosing them to be lead counsel would make it less likely that 'satellite' cases (i.e., cases filed in state court) would be filed." Def's RJN at 2.

Safeway's history of selective quotation is evident. *See* Plaintiff's Notice of Motion and Motion to Remand, filed March 5, 2008 ("Motion to Remand") [Dkt. No. 38] at 6-7 (describing Safeway's selective quotation of case law in its Notice of Removal). Safeway quotes two paragraphs, pages apart and constructs them together as if they were offered by the same attorney. While Safeway correctly contends that the first paragraph was made on behalf of "the group of lawyers...that includes Plaintiff's counsel," the second paragraph was not. *Compare* Kiser Decl.,¹ Ex. A at 16 (Mar. 28, 2008 Hearing Transcript) (quoting Thomas A. Tucker Ronzetti, a member of

¹ "Kiser Decl." refers to the Declaration of Livia M. Kiser in Support of Safeway's Request for Judicial Notice Vis-à-Vis Plaintiff's Pending Remand Motion, filed April 18, 2008 [Dkt. No. 39].

1 the “KTHB Group” (which included Plaintiff’s counsel) and advocating a leadership structure that
 2 involved two co-leads with an open executive committee structure to accommodate other counsel)
 3 *with id.* at 24 (quoting Don Downing, a member of the “National Plaintiffs Group” (which did not
 4 include Plaintiff’s counsel) and advocating a leadership structure that involved four co-leads with a
 5 closed executive committee structure). Thus, as the transcript makes clear, the second paragraph
 6 quoted by Safeway was not made by a member of “the group of lawyers...that includes Plaintiff’s
 7 counsel.”

8 After cobbling two paragraphs offered by two different attorneys, Safeway contends that a
 9 “tension” exists between these statements and Plaintiff’s Motion to Remand. However, as this Court
 10 is aware, the issues of whether Plaintiff has drawn her action in such a way as to require a remand of
 11 this case is entirely separate from the issues before the MDL Transferee Court related to resolving
 12 competing Rule 23(g) motions and the determination of the proper leadership structure of Plaintiffs’
 13 counsel in the coordinated MDL proceeding. Further, Plaintiff notes that at the March 28th hearing,
 14 counsel for Plaintiff specifically apprised Judge Webber of the motion to remand pending before this
 15 Court as well as the proceedings before the Judicial Panel on Multidistrict Litigation (“JPML”). *See*
 16 March 28, 2008 Hr’g Tr. at 47. Possessing knowledge that Plaintiff has moved to remand in this
 17 action, Judge Webber selected Plaintiff’s counsel as co-interim class counsel in the MDL
 18 proceedings before him and recognized Plaintiff’s counsel as an applicant “who [is] ‘best able to
 19 represent the interests of the class.’” *See generally* Scarlett Decl.,² Ex. A at 4-5 (April 18, 2008
 20 Memorandum and Order) (appointing Elizabeth A. Fegan as co-interim class counsel with the
 21 “primary responsibility for pursuing claims against the Defendant retailers”) (quoting Rule 23(g)).
 22 As a result, no such “tension” exists.

23 **B. Plaintiff’s Memorandum in Support of the Motion to Vacate.**

24 Second, in requesting judicial notice of Plaintiff’s Vacate Memorandum, Safeway continues
 25 to maintain its position that “a pending motion to remand is not a legitimate basis for opposing
 26 transfer and consolidation,” even though the JPML has expressly taken into account the fact of a

27 ² “Scarlett Decl.” refers to the Declaration of Shana E. Scarlett in Support of Plaintiff’s
 28 Response to Safeway’s Request for Judicial Notice, filed concurrently herewith.

1 plaintiff's motion to remand in considering whether to transfer an action. Def's RJN at 3. *See In re*
 2 *"Agent Orange" Prods. Liab. Litig.*, No. 381, 1980 U.S. Dist. Lexis 9945, *7-*8 (J.P.M.L. Jan. 29,
 3 1980). *See also* Plaintiff's Reply in Support of Motion to Remand, filed April 11, 2008 [Dkt. No. 37]
 4 at 9-10. For Safeway to continue to suggest impropriety by Plaintiff is unacceptable.

5 Additionally, after paying lip service to Plaintiff's other arguments before the JPML,
 6 Safeway notes that "neither Plaintiff *nor her counsel* will in any sense be inconvenienced by
 7 transfer, as Plaintiff's *counsel* are already before the transferee court." Def's RJN at 3.³ Yet, the
 8 convenience of *counsel* is not the relevant inquiry before the JPML, but rather the convenience of the
 9 *parties and witnesses*. *See, e.g., In re Photocopy Paper*, 305 F. Supp. 60, 61 (J.P.M.L. 1969) ("A
 10 transfer will not be ordered unless [the] convenience of the *parties and witnesses* is served and the
 11 just and efficient conduct of the actions promoted by such a transfer"). *See also* Kiser Decl., Ex. B
 12 at 11 (Plaintiff's Vacate Memorandum) (outlining the numerous California connections to Plaintiff's
 13 litigation). And, yet again, Safeway mixes its issues since the issue before this Court, on Plaintiff's
 14 Motion to Remand, is different from those under consideration before the JPML, *i.e.*, whether the
 15 statutory criteria for transfer as outlined in 28 U.S.C. § 1407 have been met under the facts as they
 16 apply to Plaintiff's case.

17 III. CONCLUSION

18 Accordingly, while Safeway contends that it provided the Court with the "necessary
 19 information" regarding the documents for which it now requests judicial notice, Plaintiff has shown
 20 that picture is incomplete. As such, Plaintiff reasserts her request that this Court grant her Motion to
 21 Remand and any such other relief as the Court deems necessary and appropriate.

22 Dated: April 21, 2008

Respectfully submitted,

23 HAGENS BERMAN SOBOL SHAPIRO LLP

24 By /s/ Shana E. Scarlett
 25 SHANA E. SCARLETT

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28 ³ All emphasis added and all internal quotations and citations omitted, unless otherwise stated.

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Exhibit 2

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THEADORA KING, individually and on behalf)
of all others similarly situated,)

Plaintiff,)

v.)

SAFEWAY, INC.,)

Defendant.)

No. 08-cv-0999-MMC

DECLARATION OF SHANA E.
SCARLETT IN SUPPORT OF
PLAINTIFF'S RESPONSE TO
SAFEWAY'S REQUEST FOR
JUDICIAL NOTICE

ACTION FILED: January 11, 2008

1 I, SHANA E. SCARLETT, declare as follows:

2 1. I am an attorney duly licensed to practice before all of the courts of the State of
3 California. I am associated with the law firm of Hagens Berman Sobol Shapiro LLP, one of the
4 counsel of record for Plaintiff in the above-entitled action. I have personal knowledge of the
5 matters stated herein and, if called upon, I could and would competently testify thereto.

6 2. Attached hereto as Exhibit A is a true and correct copy of the Memorandum and
7 Order entered by Judge E. Richard Webber in *In re Aurora Dairy Corp. Organic Milk Marketing*
8 *and Sales Practices Litigation*, Case No. 4:08-md-1907 (E.D. Mo. April 18, 2008).

9 I declare under penalty of perjury under the laws of the United States of America that the
10 foregoing is true and correct. Executed this 21st day of April 2008, at Berkeley, CA.

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12 /s/ Shana E. Scarlett
13 SHANA E. SCARLETT
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Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE AURORA DAIRY CORP.)
ORGANIC MILK MARKETING) Case No. 4:08MD01907 ERW
AND SALES PRACTICES LITIGATION)

This Order Relates to:

<i>Mothershead, et al. v. Aurora Organic Dairy</i>	Case No. 4:07CV01701 ERW
<i>Koch v. Aurora Dairy Corporation</i>	Case No. 4:08CV00254 ERW
<i>Fiallos v. Aurora Dairy Corporation</i>	Case No. 4:08CV00280 ERW
<i>Freyre, et al. v. Aurora Dairy Corporation</i>	Case No. 4:08CV00303 ERW
<i>Still et al. v. Aurora Dairy Corporation</i>	Case No. 4:08CV00305 ERW
<i>Kaye v. Aurora Dairy Corporation</i>	Case No. 4:08CV00371 ERW
<i>Hudspeth et al. v. Target Corporation</i>	Case No. 4:08CV00374 ERW
<i>Bowen v. Wal-Mart Stores, Inc.</i>	Case No. 4:08CV00382 ERW
<i>Cockrell v. Aurora Dairy Corporation</i>	Case No. 4:08CV00384 ERW
<i>Snell, et al. v. Aurora Dairy Corporation, et al.</i>	Case No. 4:08CV00385 ERW
<i>Tysseling-Mattiace v. Wild Oats Market, Inc.</i>	Case No. 4:08CV00386 ERW
<i>West et al. v. Aurora Dairy Corporation</i>	Case No. 4:08CV00387 ERW
<i>Hesse v. Costco Wholesale Corporation, et al.</i>	Case No. 4:08CV00391 ERW

MEMORANDUM AND ORDER

This matter comes before the Court on Motion of the “KTHB Group” to Appoint Two Co-Lead Counsel, an Executive Committee and Liaison Counsel for the Putative Class [doc. #6] and The National Plaintiffs Group’s Motion to Appoint Co-Interim Class Counsel Pursuant to Fed. R. Civ. P. 23(g) [doc. #32]. The Court heard arguments on these Motions during a hearing on March 28, 2008.

When coordinating multi-district litigation, district courts may “combine procedures, appoint lead counsel, recognize steering committees of lawyers, limit and manage discovery, etc. to minimize expense to all litigants and to provide judicial efficiency.” *In re Showa Denko K.K. L-Tryptophan Products Liability Litigation II*, 953 F.2d 162, 165 (4th Cir. 1992) (citing Manual for Complex Litigation (Second) §§ 33.22, 33.25 (1985)).

Defendants propose that Mark S. Mester, of the law firm of Latham & Watkins LLP, be appointed Lead Counsel for Defendants in these proceedings, and that Livia M. Kiser, of the law firm of Latham & Watkins LLP, be appointed Liaison Counsel. Plaintiffs' counsel have been unable to reach an accord on the identity of Co-Interim Class Counsel and Co-Lead Counsel ("Plaintiffs' Lead Counsel"), and have presented two competing leadership proposals to the Court. The KTHB Group proposes the appointment of two attorneys as Plaintiffs' Lead Counsel, a five-member Steering Committee, and Liaison Counsel. The National Plaintiffs Group proposes the appointment of four attorneys as Plaintiffs' Lead Counsel, a four-member Steering Committee, and Liaison Counsel. Specifically:

The KTHB Group proposal:

- Plaintiffs' Lead Counsel
 - Tucker Ronzetti (Kozyak Tropin & Throckmorton)
 - Elizabeth Fegan (Hagens Berman Sobol Shapiro, LLC)
- Steering Committee
 - Stephen Gardner (Center for Science in the Public Interest)
 - Rob Bramson (Bramson, Plutzik, Mahler & Birkhaeuser)
 - The KTHB Group intentionally left the remaining three spots on the Steering Committee open to provide room to incorporate the assistance of other attorneys.
- Liaison Counsel
 - John Campbell (Simon Passanante, PC.)

The National Group proposal:

- Plaintiffs' Lead Counsel
 - Kenneth S. Canfield (Doffernyre Shields Canfield knowles & Devine, LLC)
 - Don M. Downing (Gray Ritter & Graham, P.C.)
 - Edith M. Kallas (Whatley Drake & Kallas, LLC)
 - Adam J. Levitt (Wolf Haldenstein Adler Freeman & Herz LLC)
- Steering Committee
 - James Stranch (Branstetter, Stranch & Jennings, PLLC)
 - Tracy Rezvani (Finkelstein Thompson, LLP)
 - Maury A. Herman (Herman Gerel, LLP)
 - Curtis Gantz (Lane Alton & Horst, LLC)
 - Rebekah McKinney (Watson, Jimmerson, Martin, McKinney, Graffeo, & Helms, P.C.)
- Liaison Counsel
 - Chip Robertson (Bartimus, Frickleton, Robertson & Gorny, P.C.)

In situations such as this, where more than one qualified applicant seeks appointment as Lead Counsel, “the court must appoint the applicant best able to represent the interests of the class.” Fed. R. Civ. P. 23(a)(2)(C). This requires consideration of:

1) the work that counsel has performed in identifying or investigating potential claims in the action; 2) counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action; 3) counsel’s knowledge of the applicable law; and 4) the resources that counsel will commit to representing the class... [5] the Court may also consider other matter pursuant to counsel’s ability to fairly and adequately represent the interests of the class.

In re Delphi ERISA Litigation, 230 F.R.D. 496, (E.D. Mich. 2005) (citing Fed. R. Civ. P. 23(g)(1).

The KTHB Group, in the Court’s view, has the better plan. The Court is mindful of its responsibilities to limit costs to protect the interest of the prospective class, and to dispel the perception that class action litigation is more about rewarding counsel than providing a cost effective remedy to claimants. The KTHB Group proposes appointment of one lead counsel to prosecute claims against Aurora Dairy Corporation, and one counsel to seek relief against retailers. The National Group claims to have a plan, but offers the Court no details, and presents the prospect of being excessively costly.

It was apparent from arguments presented to the Court at the March 28, 2008 hearing that the Groups are unable to agree on the approach to the litigation or the composition of the team to proceed with the litigation. Each Group claims to be either the first into the fray or to have the larger share of claimants, but these arguments seem divisive rather than cohesive. The Court’s primary responsibility is to protect the interests of the Plaintiffs. Selecting from the stellar candidates proffered by the respective Groups for assigned roles will assure more than adequate representation for all Plaintiffs.

The selection of attorneys from both proposals is not a reflection of the Court's attempt to "assemble a compromise." The Court feels that the individuals, and their respective firms, who have been selected as Plaintiffs' Lead Counsel, Steering Committee and Liaison Counsel are the applicants who are "best able to represent the interests of the class." Fed. R. Civ. P. 23(a)(2)(C).

As detailed below, both Plaintiffs and Defendants are expected to act only through leadership counsel, unless otherwise specified by the Court. Finally, the Court's notes that the appointment of Lead Counsel does not indicate either approval or disapproval of the *in camera* fee proposals that were submitted in response to the Court's Memorandum and Order dated April 3, 2008.

Accordingly,

IT IS HEREBY ORDERED that Motion of the "KTHB Group" to Appoint Two Co-Lead Counsel, an Executive Committee and Liaison Counsel for the Putative Class [4:08MD01907 doc. #6, 4:07CV01701 doc. #18, 4:08CV00254 doc. #3, 4:08CV00280 doc. #3, 4:08CV00303 doc. #4, 4:08CV00305 doc. #4] is **DENIED**.

IT IS FURTHER ORDERED that The National Plaintiffs Group's Motion to Appoint Co-Interim Class Counsel Pursuant to Fed. R. Civ. P. 23(g) [4:08MD01907 doc. #32, 4:07CV01701 doc. #27, 4:08CV00254 doc. #19, 4:08CV00280 doc. #12, 4:08CV00303 doc. #13, 4:08CV00305 doc. #13, 4:08CV00371 doc. #10, 4:08CV00374 doc. #9, 4:08CV00382 doc. #9, 4:08CV00384 doc. #9, 4:08CV00385 doc. #15, 4:08CV00386 doc. #10, 4:08CV00387 doc. #9, 4:08CV00391 doc. #9] is **DENIED**.

IT IS FURTHER ORDERED that Mark S. Mester, of the law firm of Latham & Watkins LLP, is appointed Defendants' Lead Counsel.

IT IS FURTHER ORDERED that Livia M. Kiser, of the law firm of Latham & Watkins LLP, is appointed Defendants' Liaison Counsel. As such, she is responsible for keeping all defense counsel apprised of any changes in Plaintiffs' service list, coordinating all discovery and pretrial matters on behalf of Defendants, ensuring that all defense counsel are served with all court orders and are consulted and kept informed on all aspects of the pretrial phase of these cases.

IT IS FURTHER ORDERED that the Plaintiffs' leadership structure will be:

1. Don M. Downing (Gray Ritter & Graham, P.C.) and Elizabeth Fegan (Hagens Berman Sobol Shapiro, LLC) are appointed Co-Interim Class Counsel and Co-Lead Counsel ("Lead Counsel"). Don M. Downing will have primary responsibility for pursuing claims against Aurora Dairy Corporation, while Elizabeth Fegan shall have primary responsibility for pursuing claims against the Defendant retailers.
2. Chip Robertson (Bartimus, Frickleton, Robertson & Gorny, P.C.) is appointed Plaintiffs' Liaison Counsel. As such, he shall be the attorney to whom the Court may direct inquiries and shall be responsible for maintaining and distributing an up-to-date service list, distributing to all Plaintiff's counsel all Court Orders, pleadings and other documents, and performing other assignments deemed necessary as the case progresses.
3. The following attorneys are appointed to Plaintiffs' Steering Committee:
Robert M. Bramson (Bramson, Plutzik, Mahler & Birkhaeuser, LLP), Edith M. Kallas (Whatley Drake & Kallas, LLC), Adam J. Levitt (Wolf Haldenstein Adler Freeman & Herz LLC) and Tucker Ronzetti (Kozyak Tropin & Throckmorton). Plaintiffs' Lead Counsel shall confer and submit the name of a fifth attorney for the Plaintiffs' Steering Committee to the Court no later than **April 25, 2008.** The Steering Committee shall

operate under the direction of Lead Counsel and shall assist Lead Counsel in all aspects of the case.

IT IS FURTHER ORDERED that Plaintiffs' Lead Counsel shall act on behalf of all Plaintiffs and the other members of the proposed classes as follows:


1. To direct and execute on behalf of Plaintiffs the filing of pleadings and other documents with the Court;
2. To direct and manage pretrial proceedings on behalf of all Plaintiffs, including the briefing and argument of motions and the conduct of all types of discovery proceedings;
3. To seek the assistance of other Plaintiffs' counsel, including, but not limited to, those on the Executive Committee, in performance of all work necessary for the prosecution of the case, including investigation, research, briefing, and discovery, with particular attention to using efficiently the resources of the other Plaintiffs' counsel in a matter commensurate with those lawyers' resources and experience.
4. To call and chair meetings of Plaintiffs' counsel;
5. To direct and conduct settlement negotiations;
6. To direct and arrange a system for keeping and collecting all Plaintiffs' counsel's time records; and
7. To supervise any other matters concerning the prosecution or resolution of this litigation.

IT IS FURTHER ORDERED that a Consolidated Complaint be filed no later than **May 19, 2008.**

IT IS FURTHER ORDERED that Defendants' Answer be filed no later than **July 3, 2008.** Upon receipt of the Answer, the Court will schedule a Rule 16 Conference.

IT IS FURTHER ORDERED that within ten (10) days, Lead Counsel for Plaintiffs and Defendants should meet and confer regarding the preservation of documents and electronic materials, confidentiality issues, and protective orders.

Dated this 18th Day of April, 2008.



E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE